89-913

No. _____

In The

Supreme Court of the United States

October Term, 1989

ELWIN ETHERIDGE,

Petitioner,

v.

CHARLES S. ANDREWS AND
SHELBY S. ANDREWS, his wife,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

NANCY A. LAUTEN, ESQUIRE
Counsel of Record

and

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QUESTION PRESENTED

Whether the minimum contacts of a corporation, which are sufficient to satisfy constitutional requirements as to the corporation, may be imputed to a corporate officer so that he is subject to the in personam jurisdiction of the forum state for his acts as a corporate decision-maker.

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TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

Elwin Etheridge respectfully petitions for a writ of certiorari to review an order of the Florida Fifth District Court of Appeal entered on July 25, 1989.

OPINIONS BELOW

The decision of the Fifth District Court of Appeal is a per curiam affirmance of a lower court order and is set out as Appendix A, p. 1a of the petition. This decision is not reported.

The order of the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Marion County, Florida, is set out as Appendix B, p. 2a. This decision is not reported.

JURISDICTION

The judgment of the Fifth District Court of Appeal was entered on July 25, 1989. Rehearing was sought and subsequently denied. A copy of that order is set out as Appendix C, p. 4a of this petition. This decision constitutes a decision from the highest state court empowered to hear this cause and further proceedings may be taken directly to this Court. *The Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1986). Jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION AND FLORIDA STATUTE INVOLVED

Fourteenth Amendment, United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Section 48.193, Florida Statutes (1987):

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
>
> (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
>
> * * *
>
> (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
>
> 1. The defendant was engaged in solicitation or service activities within this state; or
>
> 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

STATEMENT OF THE CASE

1. The Litigation

Elwin Etheridge, the Petitioner, is a citizen and resident of Mississippi. He is being sued as an individual in a Florida court by a citizen and resident of Mississippi. In April of 1988, the Respondents, Plaintiffs below, brought suit against the Petitioner in Marion County, Florida for a work-related accident that occurred on April 30, 1986. *See* Appendix D, p. 5a. The facts giving rise to the action below are not complex. On April 30, 1986, Charles S. Andrews, a foreman for Etheridge Petroleum and Electric, Inc. (Etheridge Petroleum), suffered injuries in an accident at the Charter Oil Gasoline Station in Silver Springs, Florida. Etheridge Petroleum is a Mississippi corporation headquartered in Jackson, Mississippi. The Petitioner is an employee and corporate officer of Etheridge Petroleum. The corporation had sent a crew of three men into Florida to perform work that it was obligated to perform under agreements with Charter Marketing.

Mr. Andrews, who is receiving Florida workers' compensation benefits for his injuries, is now suing Mr. Etheridge in the Florida court, individually, pursuant to *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987). *Streeter* establishes an exception to the statutory workers' compensation immunity granted to co-employees in those cases in which the co-employee's act of gross negligence results in an injury to a fellow employee. This exception also encompasses the actions of corporate officers. The original complaint alleged that Elwin Etheridge, as corporate officer and employee of Etheridge Petroleum, acted

with gross negligence and was guilty of willful and wanton misconduct resulting in a foreseeable injury to Mr. Andrews. *See* Appendix D, p. 8a.

On June 8, 1988, Mr. Etheridge served his motion to dismiss the Andrews' complaint because of lack of personal jurisdiction over the Petitioner. *See* Appendix E, p. 11a. Affidavits and a memorandum of law were filed in support of the motion. These documents reveal that Elwin Etheridge is a resident and citizen of the State of Mississippi and has been such a resident and citizen at all relevant times, including April 30, 1986. Elwin Etheridge owns no real property located in the State of Florida. He has not, in his individual capacity, engaged in solicitation or service activities within the State of Florida. As an individual, Elwin Etheridge is not involved with products, materials, or things processed, serviced or manufactured by himself that were used or consumed inside the State of Florida at the time of the accident. The affidavits also established that on the date of the accident, Elwin Etheridge was not inside the State of Florida and specifically was not at the site of the accident alleged in the Complaint filed by Mr. Andrews. Any discussions about the Florida job took place in Mississippi. *See* Appendix F, p. 14a. The Respondents filed an affidavit and memorandum of law in opposition to the motion to dismiss. *See* Appendix G, p. 17a. On September 13, 1988, the Circuit Court of the Fifth Judicial Circuit of the State of Florida entered its order granting Elwin Etheridge's motion to dismiss the action for lack of jurisdiction over the person. *See* Appendix H, p. 20a. The Andrews did not seek rehearing. The Andrews did not appeal this final order.

Thirty-one days later, on October 14, 1988, the Andrews filed an amended complaint. *See* Appendix I, p. 22a. The only new material added to the amended complaint was the Andrews' assertion that Elwin Etheridge was subject to the jurisdiction of the courts of the State of Florida pursuant to Section 440.11(1), Florida Statutes (1987) and *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987). No new affidavits or evidence was served with the amended complaint. On October 24, 1988, Elwin Etheridge filed a motion to strike this amended complaint on the grounds that the lower court had previously ruled that it lacked jurisdiction over the person of Elwin Etheridge and there was no longer a proceeding in Florida in which the Andrews could pursue this matter. *See* Appendix J, p. 28a.

On November 10, 1988, the Judge of the Circuit Court entered his order on motion denying Elwin Etheridge's motion to strike the amended complaint. *See* Appendix B, p. 2a. The Judge ruled that the Andrews had produced sufficient affidavits and alleged sufficient facts to warrant jurisdiction over Elwin Etheridge. An appeal was taken to the Fifth District Court of Appeal. That Court affirmed, without opinion, the order of the lower court determining jurisdiction over the person of Elwin Etheridge. Mr. Etheridge's motion for rehearing was denied without comment.

Elwin Etheridge now petitions this Court for a writ of certiorari to review the opinion below.

2. How The Federal Question was Presented

The issue of whether the application of the Florida Long-Arm Statute to the facts of this case violates Elwin

Etheridge's rights under the Fourteenth Amendment to the United States Constitution was first raised in the Petitioner's motion to dismiss the original complaint for lack of jurisdiction over the person. The motion contained the following allegation:

> This Court lacks jurisdiction over the person of Mr. Etheridge because he has insufficient contacts with the State of Florida to justify jurisdiction under the U.S. Constitution and under the Florida Constitution.

This issue was also raised in Mr. Etheridge's memorandum of law in support of his motion to dismiss the amended complaint. The Circuit Court again denied Elwin Etheridge's requested relief. The issue of whether the lower court lacked constitutional jurisdiction over the person of Elwin Etheridge was also presented to the Fifth District Court of Appeal in the Petitioner's Initial and Reply Briefs. The appellate court affirmed the lower court's decision without opinion.

REASONS FOR GRANTING THE WRIT

POINT I.

THE RULING OF THE FIFTH DISTRICT COURT OF APPEAL WRONGFULLY SUBJECTS ELWIN ETHERIDGE TO THE JURISDICTION OF THE FLORIDA COURTS.

This is not a complex case. It does not involve big names, hundreds of plaintiffs or defendants, or vast sums of money. The effects of a ruling allowing a corporation's constitutional minimum contacts to be imputed to its individual officers and employees will, however, affect

thousands of individuals whose employers are involved in interstate commerce. Simply stated, this case involves the rights of an individual corporate employee to be free from the unwarranted exercise of jurisdiction over him by the courts of a state in which he has no contacts or connections. The corporation, Etheridge Petroleum, has not been made a party to this proceeding due to the fact that Charles S. Andrews is receiving benefits under the Florida Workers' Compensation Act. What the Respondents are attempting to do is circumvent the provisions of Section 440.11, Florida Statutes (1987). This section provides that the Workers' Compensation Act shall be the exclusive remedy for an injured worker. The employer's immunity from suit extends to each employee of the employer, as well as corporate officers, unless the employee acts with willful and wanton disregard or with gross negligence. *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987). The Mississippi Workers' Compensation Act does not contain a similar exception from immunity for an employee who acts with willful and wanton disregard or with gross negligence.

Arguably, the Respondents have stated a cause of action under Florida law against Mr. Etheridge. However, that is not the issue here. Rather, the issue for this Court to decide is whether the minimum contacts of a corporation, which are sufficient to satisfy constitutional due process requirements as to the corporation, may be imputed to a corporate officer so that he may be subject to in personam jurisdiction for his acts as a corporate decision-maker. The Fifth District Court of Appeal was required to examine such an application of the Florida Long-Arm Statute in this suit between two non-Florida

residents. The lower court had determined that sufficient facts existed to warrant jurisdiction over the person of Elwin Etheridge. The Fifth District Court of Appeal's examination produced a per curiam affirmance of the lower court's order. This decision effectively holds that a non-resident corporate officer can be personally subjected to the long-arm jurisdiction of Florida for merely directing a corporate employee to perform the corporation's work in Florida. The use of the Florida Long-Arm Statute in this case clearly violates Elwin Etheridge's rights under the Fourteenth Amendment to the United States Constitution.

Over the past few years, this Court has addressed the rights of a corporation with respect to a state's attempt to exercise in personam jurisdiction over the non-resident corporation. Where minimum contacts are lacking, jurisdiction will not be sustained. The next logical step in this Court's rulings on jurisdictional issues is to extend the principles established in those cases to protect the rights and interests of the individual corporate decision-makers. This case presents the Court with such an opportunity.

POINT II.

THE USE OF THE FLORIDA LONG-ARM STATUTE TO REQUIRE ELWIN ETHERIDGE TO DEFEND THIS CASE ON THE MERITS VIOLATES HIS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It has long been established that due process requires that a non-resident defendant have minimum contacts with the forum state before personal jurisdiction is

proper. *International Shoe Company v. Washington*, 326 U.S. 310 (1945). Minimum contacts can be established only if the defendant has substantial activities in the state, he purposefully directs his activities to the forum state, or he personally derives benefit from an activity in the forum state. *Asahi Metal Industry Company v. Superior Court of California, Solano County*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Factors to consider in determining jurisdiction include (1) the burden on the defendant of appearing in a particular locality; (2) the forum state's interest in adjudicating this dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the judicial system's interest in obtaining the most effective resolution of the controversy; and (5) the public interest in furthering fundamental substantive social policies. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

This Court noted in *World-Wide Volkswagen*, 444 U.S. at 297, that the "orderly administration of the laws" prescribed in *International Shoe*, 326 U.S. at 319, embraces "a degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." Thus it is important to determine whether Elwin Etheridge "engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable." *Rush v. Savchuk*, 444 U.S. 320 (1980). A defendant who acts voluntarily "has clear notice that [he] is subject to suit [in the forum], and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected cost onto customers, or, if the risks are too great, severing

[his] connection with the state." *World-Wide Volkswagen*, 440 U.S. at 319.

The question then is not simply whether the defendant should have foreseen that his conduct would have some impact in the forum. An answer to that question does not resolve the issue because the defendant may be unable to control entirely even the foreseeable consequences of his acts. *Calder v. Jones*, 465 U.S. 783 (1984). The question instead, is whether the defendant should reasonably have foreseen that he would be called to answer for his conduct in the forum, because, through his own purposeful acts, he linked his interests with the forum. By those voluntary acts, he has effectively consented to jurisdiction. *World-Wide Volkswagen*, 440 U.S. at 297.

The constitutional application of long-arm statutes in cases involving corporations has been addressed in two recent court opinions. In *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985), this Court addressed the use of the Florida Long-Arm Statute in an action between Burger King and a franchisee. Burger King, a Florida corporation, brought a breach of contract action against non-Florida residents seeking to terminate a franchise operation. John Rudzewicz and Brian MacShara, Michigan residents, entered into a franchise agreement with Burger King in order to operate a restaurant in the Detroit, Michigan area. The contract between Burger King and the franchisees provided that the franchise relationship was established in Miami and governed by Florida law. The contract also called for payment of all required fees and forwarding of all relevant notices to the Miami headquarters. The Miami headquarters set policy and

worked directly with its franchisees in attempting to resolve any major problems. 471 U.S. at 465-66. During the course of the relationship, MacShara attended management courses in Miami and the franchisees purchased restaurant equipment from Miami. It was established that Rudzewicz and MacShara communicated directly with the Miami headquarters in forming the franchise contracts. They also turned directly to the Miami headquarters in seeking to resolve their disputes. *Id.* at 466-67.

Difficulties arose and the franchisees eventually fell behind in their monthly payments. Prolonged, but unsuccessful negotiations by mail and telephone ensued between Burger King officials in Miami and the franchisees. Burger King headquarters eventually terminated the franchise and ordered Rudzewicz and MacShara to vacate the premises. When they refused, Burger King filed suit in federal district court. 471 U.S. at 468. Rudzewicz and MacShara entered a special appearance in which they claimed that because they were Michigan residents and because Burger King's claim did not "arise" within the Southern District of Florida, the Court lacked jurisdiction over them. 471 U.S. at 469. After a hearing on the matter, the district court held that under the Florida Long-Arm Statute, Section 48.193(1)(g) (1984 Supp.), the franchisees were subject to the personal jurisdiction of the Court. The action proceeded to trial where a judgment was entered against Rudzewicz and MacShara for $228,875.00 in contract damages. The franchisees were also ordered to turn over possession of the restaurant to Burger King Corporation. 471 U.S. at 469.

Rudzewicz appealed the judgment to the Court of Appeals for the Eleventh Circuit, which reversed the

judgment on the basis that there was no personal jurisdiction over Rudzewicz. The Court held that the exercise of jurisdiction under the facts of the case would offend the traditional notions of fundamental fairness. 471 U.S. at 470. Burger King appealed the Eleventh Circuit judgment to this Court.

In its opinion, this Court repeated the well-established principle of law that a defendant must have purposefully established "minimum contacts" in the forum state in order to be subject to jurisdiction within that state, citing *International Shoe Company v. Washington*, 326 U.S. 310 (1945). Mere foreseeability of causing an injury in another state is not sufficient for exercising personal jurisdiction. Instead, the defendant must purposefully avail himself of the privilege of conducting activities within the forum state such that he can "reasonably anticipate being haled into court there." 471 U.S. at 474. Where a defendant deliberately engages in significant activities within a state or has created "continuing obligations between himself and the residents of the forum, it is not unreasonable to require him to submit to the burdens of litigation in that forum." 471 U.S. at 476. However, the "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." *Id.* at 478-79.

Based on the record before it, this Court concluded that the exercise of personal jurisdiction over Rudzewicz in Florida for the alleged breach of the franchise agreement did not offend due process notions. 471 U.S. at 478. Although Rudzewicz had no physical ties to Florida, this Court found that the dispute grew out of a contract that

had substantial connection with Florida. *Id.* at 479. This Court stated:

> In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the 'quality and nature' of his relationship to the company in Florida can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.' Rudzewicz' refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injuries to the corporation in Florida. For these reasons it was, at the very least, presumptively reasonable for Rudzewicz to be called to account there for such injuries.

Burger King Corporation, 471 U.S. at 480. (citations omitted) This Court concluded that the choice of law provision in the franchise agreement, combined with the twenty-year interdependent relationship Rudzewicz established with Burger King headquarters, reinforced Rudzewicz' deliberate affiliation with Florida and the reasonable foreseeability of litigation in Florida. 471 U.S. at 482. As a result, this Court held that the exercise of personal jurisdiction over Rudzewicz pursuant to Section 48.193(1)(g), Florida Statutes (1984 Supp.), did not offend due process.

The exercise of personal jurisdiction over a non-resident corporation by the use of a long-arm statute was also addressed in *Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987). In *Asahi*, a product liability suit was brought in a California court as a result of a motorcycle accident allegedly caused by a defective tire manufactured by

Cheng Shin, a Taiwanese corporation. Cheng Shin in turn filed a cross-complaint for indemnification against Asahi Metal Industry Company, a Japanese company which manufactured tire-valve assemblies. All of Asahi's sales to Cheng Shin occurred in Taiwan. 480 U.S. at 106. The primary action was eventually settled and dismissed but the Court denied Asahi's motion to quash the summons issued against it. This order was ultimately affirmed by the California Supreme Court. That Court noted that Asahi had no offices, property or agents in California and that it did not solicit business in California or have direct sales in the state. 480 U.S. at 108. However, the Court held that Asahi's intentional placing of the valve assemblies into the stream of commerce, together with its awareness that some of them would eventually reach California, was sufficient to support state court jurisdiction under the Due Process Clause. 480 U.S. at 108.

In certiorari proceedings, this Court determined that the question to be answered was whether:

> the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum state such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.' "

Asahi Metal Industries, 480 U.S. at 105. (citations omitted) This Court noted that in order to decide whether an exercise of personal jurisdiction is compatible with due process it must be determined whether the defendant "purposefully established 'minimum contacts' in the

forum state." 480 U.S. at 108-09. A consumer's unilateral act of bringing the defendant's product into the forum state is not a sufficient constitutional basis for exercising personal jurisdiction over the defendant. *Id.* at 110. Similarly, something more than the defendant's awareness of its product's entry into the forum state through the stream of commerce is needed in order for a state to exercise jurisdiction over the defendant. 480 U.S. at 110.

Turning to the facts of the case before it, this Court concluded that Asahi Metal did not purposefully avail itself of the California market. Asahi did not do business in the State of California. It had no office, no agents, employees, or property in California. Asahi did not advertise or otherwise solicit business in California, nor did it create, control, or employ the distribution system that brought its product to California. Based on these facts, this Court held that the "exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of Due Process." *Asahi Metal*, 480 U.S. at 113.

This Court also examined whether exercising personal jurisdiction over Asahi would offend "traditional notions of fair play and substantial justice." 480 U.S. at 113. Factors to be considered include the burden on the defendant, the interest of the forum state, and the plaintiff's interest in obtaining relief. This Court determined that the burden on Asahi was severe whereas the interests of the plaintiff and the State of California were slight. Similarly, Cheng Shin failed to demonstrate that it was more convenient for it to litigate the indemnification claim against Asahi in California rather than Taiwan or Japan. *Id.* at 114. Because Cheng Shin was not a California

resident, "California's legitimate interests in the dispute have considerably diminished." *Id.* This Court concluded that the facts of the case did not "establish minimum contacts such that the exercise of personal jurisdiction is consistent with fair play and substantial justice." *Asahi Metal,* 480 U.S. at 116.

In this case, the question is whether Elwin Etheridge, individually, had sufficient minimum contacts with Florida such that the maintenance of this suit would not offend the traditional notions of fair play and substantial justice. *Kulko v. Superior Court of California,* 436 U.S. 84 (1978). The answer depends on whether the "quality and nature" of Elwin Etheridge's activity was such that it was "reasonable" and "fair" to require him to defend this action in Florida. *Kulko v. Superior Court of California,* 436 U.S. at 92.

The facts in this case demonstrate a complete absence of the circumstances that are a necessary predicate to any state court jurisdiction. Elwin Etheridge is a resident of Terry, Mississippi. The Andrews are also residents of Mississippi. Florida's interest in affording its resident plaintiffs convenient and effective relief simply does not exist in this case. No fundamental social policies are furthered by keeping this action in the Florida court system because this suit arose out of a Mississippi employment relationship. The Mississippi courts, not the Florida courts, have the strongest interest in resolving this controversy. Mississippi is also the most convenient place for obtaining effective resolution of the controversy because all parties reside in that state.

It was Etheridge Petroleum, a Mississippi corporation, that had contacts with the State of Florida. The accident arose out of the Mississippi employment relationship. As established by the affidavits, all discussions concerning the Florida job took place in Mississippi. There is little doubt that the corporation would be subject to the jurisdiction of the Florida courts. However, the corporation's contacts with Florida are insufficient to confer personal jurisdiction over Elwin Etheridge. Given the non-existent nature of his activities in Florida, it is unreasonable and unfair to expect Elwin Etheridge to defend this action in Florida. There are no allegations that Elwin Etheridge ever placed so much as a single telephone call to the State of Florida. The record shows that Elwin Etheridge was only an officer of the corporation and that at no time has he engaged in business in Florida for his personal advantage. Any product or material used by the Respondent in Florida was under the control of Etheridge Petroleum. At best, the only "contact" that Mr. Etheridge could be said to have with Florida is that he is the "decision-maker" for the Mississippi corporation to do business in Florida.

Unlike John Rudzewicz, Elwin Etheridge was not individually involved in a dispute which grew out of any contract that had substantial connections with Florida. There is also no evidence whatsoever that Elwin Etheridge, unlike John Rudzewicz, deliberately engaged in significant activities within Florida or created "continuing obligations between himself and residents" of Florida. The only evidence presented to the court reveals that Elwin Etheridge, as an individual, engaged in no service activities in Florida nor was he personally

involved with servicing or manufacturing any product used in the State of Florida. Additionally, Elwin Etheridge does not own real property in the State of Florida nor does he have a business office or bank account in this State. Like Asahi Metal, Elwin Etheridge completely lacks minimum contacts with the State and could not reasonably anticipate being haled into court in Florida. Elwin Etheridge, as an individual, did not purposefully avail himself of the Florida market. Likewise, Elwin Etheridge, as an individual, did not conduct business in the State of Florida. Allowing the Florida courts to exercise personal jurisdiction over Elwin Etheridge under the facts established in this case would be no different than allowing California to exercise its long-arm jurisdiction over the president of Asahi Metal in his role as corporate decision-maker. In both situations, the exercise of personal jurisdiction pursuant to a long-arm statute would offend due process.

This Court has consistently held that in order to exercise personal jurisdiction over a non-resident it must be shown that the requisite minimum contacts with the forum state are present. *International Shoe Company v. Washington*, 326 U.S. 310 (1945). The unilateral acts of the Respondents cannot, in and of themselves, provide Elwin Etheridge with the requisite minimum contacts mandated by this Court. This Court has stated:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of

> conducting activities within the forum state, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253 (1958). Jurisdiction is only proper where the contacts proximately result from the actions by the defendant himself that create a "substantial connection" with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 475. Where the defendant has deliberately engaged in significant activities within a state or has created "continuing obligations" between himself and residents of the forum, the defendant will be considered to have availed himself of the privilege of conducting business within the forum state. Because his activities are shielded by the "benefits and protections" of the forum's laws, it is not considered unreasonable to require the defendant to submit to the burdens of litigation in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 475-76. As this Court reaffirmed in *Burger King* and *Asahi Metal*, "the facts of each case must [always] be weighed" in determining whether personal jurisdiction would comport with "fair play and substantial justice." *Burger King*, 471 U.S. at 485-86.

Here, Elwin Etheridge, as an individual, has not purposefully availed himself of the privilege of conducting activities within the State of Florida. Neither party has sufficient contacts with the State of Florida to justify the exercise of personal jurisdiction over Elwin Etheridge. Florida courts cannot constitutionally impute the minimum contacts of a corporation which does business in Florida to a non-resident corporate employee who has no contacts with Florida. After weighing the facts in this case, it is clear that the exercise of personal jurisdiction

over Elwin Etheridge does not comport with the notions of fair play and substantial justice. The exertion of personal jurisdiction over Elwin Etheridge by the circuit court of Florida exceeds the limits of Due Process. *Asahi Metal*, 480 U.S. 102, 113.

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted.

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Counsel of Record

and

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ATTORNEYS FOR PETITIONERS

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1989

ELWIN ETHERIDGE,

Appellant,

v.

CHARLES S. ANDREWS, et ux.,

Appellees,

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF

CASE NO. 88-2419

_____/

Decision filed July 25, 1989

Non-Final Appeal from the Circuit Court
for Marion County,
Wallace E. Sturgis, Jr., Judge.

Nancy A. Lauten of Fowler, White,
Gillen, Boggs, Villareal & Banker,
P.A., Tampa, for Appellant.

Patrick O. Helm of Brooks & Helm,
P.A., Gainesville, for Appellees.

PER CURIAM.

AFFIRMED.

DAUKSCH and ORFINGER, JJ., and McNULTY, J.P.,
Associate Judge, concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA.
CASE NO.: 88-1463-CA-A

CHARLES S. ANDREWS, et ux,

Plaintiff(s)

vs.

ELWIN ETHERIDGE,

Defendant(s)

ORDER ON MOTION

THIS CAUSE, having come before the court on Defendant's Motion to Strike and the Court having reviewed the memorandum of law submitted by the parties and being otherwise advised in the premises, the Court does hereby,

ORDER AND ADJUDGE: The Court has jurisdiction to decide jurisdiction; the Plaintiff having now produced sufficient affidavits and having alleged sufficient facts to warrant jurisdiction over the Defendant, it is therefore ordered that the Defendant, Elwin Etheridge's Motion to Strike the Amended Complaint is DENIED; Defendant shall file responsive pleadings within TWENTY (20) days of the date of this Order.

DONE AND ORDERED this 10th day of November 1988 in Chambers at Marion County, Florida.

/s/ Wallace E. Sturgis, Jr.,
Wallace E. Sturgis, Jr.,
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was furnished by U.S. Mail this 10th day of November 1988 to the following counsel:

Chris W. Altenbernd, Esq.,
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Patrick O. Helm, Esq.,
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Gainesville, Fl. 32602

/s/ Stephen D. Spivey
Stephen D. Spivey
Staff Attorney

APPENDIX C

IN THE DISTRICT OF APPEAL OF THE
STATE OF FLORIDA FIFTH DISTRICT

ELWIN ETHERIDGE,
Appellant,

v. Case No. 88-2419

CHARLES S. ANDREWS, et ux.,
Appellee.

_____/

DATE: September 6, 1989

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING AND MOTION FOR REHEARING EN BANC, filed August 9, 1989, is denied.

I hereby certify that the foregoing is (a true copy of) the orginal court order.

/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Nancy A. Lauten, Esq.
Patrick O. Helm, Esq.

APPENDIX D

IN THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA.

CHARLES S. ANDREWS and SHELBY ANDREWS, his wife,

Plaintiffs,

vs.

ELWIN ETHERIDGE,

Defendant.

_____/

CASE NO.: 88-1463-CA-A

COMPLAINT

COMES NOW, the Plaintiffs, CHARLES S. and SHELBY ANDREWS, by and through their undersigned attorney and sues ELWIN ETHERIDGE and states:

COUNT I

1. This is an action for damages in excess of $5,000.00.

2. At all times material hereto, the Plaintiff, CHARLES S. ANDREWS, was over 21 years of age.

3. At all times material hereto, the Defendant, ELWIN ETHERIDGE, was the owner, corporate officer and employee of Etheridge Petroleum and Electric, Inc. d/b/a Armor Shield of Mississippi. Etheridge Petroleum and Electric, Inc. is incorporated in the State of Mississippi and ELWIN ETHERIDGE is a resident of the State of Mississippi.

4. ELWIN ETHERIDGE is subject to jurisdiction of the courts of the State of Florida pursuant to Chapter 48.193 *Florida Statutes* as a result of committing the following acts:

A. Operating, conducting, engaging in or carrying on a business venture in the State of Florida.

B. Causing injury to persons or property within the State of Florida arising out of an act or omission by the Defendant outside the State of Florida.

5. Etheridge Petroleum and Electric, Inc. is engaged in the business of installing, repairing and cleaning gasoline station pumping equipment and underground fuel storage tanks.

6. On or about April 30, 1986, the Plaintiff, CHARLES S. ANDREWS, was an employee of Etheridge Petroleum and Electric, Inc. as the foreman for a crew to repair and clean underground fuel storage tanks. While sandblasting the interior of an underground fuel storage tank located at the Charter Oil Gasoline Station in Silver Springs, Marion County, Florida, an explosion occurred inside the tank, resulting in serious and catastrophic injuries to the Plaintiff, CHARLES S. ANDREWS.

7. At the time of the accident, the Plaintiff was using air compressors, sand blasters and electrical equipment owned and maintained by Etheridge Petroleum and Electric, Inc.

8. As corporate officer and employee of Etheridge Petroleum and Electric, Inc., ELWIN ETHERIDGE was directly responsible for the equipment used by the Plaintiff and his crew. In his capacity as corporate officer and

employee, ELWIN ETHERIDGE was personally knowledgeable as to the type of equipment necessary for the proper and safe conduct of the Plaintiff's job of cleaning out underground fuel tanks. He was also personally knowledgeable of the maintenance status of the equipment used by the Plaintiff at the time of the accident.

9. The Plaintiff, CHARLES S. ANDREWS, was injured in the accident of April 30, 1986, as a direct result of the negligence of ELWIN ETHERIDGE in that:

A. The Defendant, ELWIN ETHERIDGE, failed to provide the Plaintiff, CHARLES S. ANDREWS, with an air compressor of sufficient size and power to operate all of the equipment necessary for the successful completion of the job and operate the proper air mover to insure adequate ventilation and the removal of flammable vapors from the fuel tank. Because the power from the compressor was insufficient, the Plaintiff was forced to use an inadequate ventilation system which was below fire code standards for this type of work.

B. The Defendant, ELWIN ETHERIDGE, failed to provide the Plaintiff, CHARLES S. ANDREWS, with adequate and properly wired lighting equipment to use inside the fuel tank while it was being cleaned. Specifically, the lamp attached to the sandblasting hose used to clean the tank was improperly wired and maintained.

C. As a result of the inadequate ventilation and removal of flammable vapors as well as the improperly wired and maintained lamp and electrical wiring, an explosion occurred in the fuel tank being cleaned by the Plaintiff, resulting in serious and catastrophic injuries to the Plaintiff.

10. The Defendant, ELWIN ETHERIDGE, knew of the defects outlined in paragraph 9 above and was fully aware that the equipment provided was substandard and improperly maintained for their proper and safe use by the Plaintiff as intended. Despite this knowledge, and, further, despite the fact that the Defendant has been asked by the Plaintiff CHARLES S. ANDREWS, as well as other employees, to correct these deficiencies, the Defendant continued to provide the Plaintiff with the substandard equipment.

11. As a result of the failure outlined in paragraph 10, the Defendant, ELWIN ETHERIDGE failed to provide the Plaintiff, CHARLES S. ANDREWS, with a reasonably safe and secure place to undertake his work for the defendant.

12. As a result of his failures outlined above, the Defendant, ELWIN ETHERIDGE acted with gross negligence and was guilty of wilful and wanton misconduct resulting in a foreseeable injury to the Plaintiff, CHARLES S. ANDREWS.

13. As a direct and proximate result of the Defendant's gross negligence and wilful and wanton misconduct, the Plaintiff, CHARLES S. ANDREWS, was injured in and about his body and extremities, suffered permanent disability, permanent disfigurement, mental anguish, pain and suffering, loss of capacity for the enjoyment of a normal life, aggravated a preexisting condition, or activated a latent condition, lost wages, suffered an impairment of his earning capacity, and incurred medical and hospital expenses in the treatment of said

injuries. Said injuries are permanent and continuing in nature.

WHEREFORE, the Plaintiff, CHARLES S. ANDREWS, demands damages for compensation in an amount in excess of $5,000.00, from the Defendant, ELWIN ETHERIDGE, exclusive of costs of this action and post-judgment interest, and further demands trial by jury on all issues.

COUNT II

14. The Plaintiff, SHELBY ANDREWS, realleges paragraphs 1 through 13 and further alleges:

15. That as a further direct and proximate result of the aforesaid gross negligence and wilful and wanton misconduct by the Defendant, ELWIN ETHERIDGE, and as a result of the injuries sustained by her husband, CHARLES S. ANDREWS, SHELBY ANDREWS will be deprived of her husband's consortium, services, care and the comfort of his society.

WHEREFORE, the Plaintiff, SHELBY ANDREWS, demands damages for compensation, in an amount in excess of $5,000.00, from the Defendant, ELWIN ETHERIDGE, exclusive of costs of this action and post-judgment interest and further demands a trial by jury on all issues.

/s/ Patrick O. Helm
PATRICK O. HELM,
ESQUIRE
ATTORNEY FOR
PLAINTIFFS
BROOKS & HELM, P.A.

P.O. Box 2921
Gainesville, FL 32602
(904) 376-3028

APPENDIX E

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY, FLORIDA. CIVIL ACTION.

CHARLES S. ANDREWS and SHELBY ANDREWS, his wife,

Plaintiffs,

vs.

ELWIN ETHERIDGE,

Defendant.

CASE NO. 88-1463-CA-A

FLORIDA BAR NO. 197394

MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON

The Defendant, Elwin Etheridge, by and through his undersigned attorneys appears specially herein and moves this Court for the entry of an order dismissing the Complaint of the Plaintiffs for lack of jurisdiction over his person. In support of this Motion, this Defendant shows to this Court that:

1. The Plaintiffs have sued Mr. Etheridge as a co-employee under the Florida legal theories announced in *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987).

2. The Plaintiffs have affirmatively alleged that Elwin Etheridge is not a resident of Florida but is instead a resident of the State of Mississippi.

3. The Plaintiffs have not alleged that Mr. Etheridge was at the scene of the accident or even in the State of Florida at the time of the accident.

4. Mr. Etheridge is not a Florida resident or citizen, does not own property in Florida, is not engaging in business in the State of Florida in his individual capacity and is not producing materials or things outside the State which are consumed within the State in the ordinary course of commerce.

5. This Court lacks jurisdiction over the person of Mr. Etheridge because jurisdiction is not authorized against him pursuant to Chapter 48, *Florida Statutes*.

6. This Court lacks jurisdiction over the person of Mr. Etheridge because he has insufficient contacts with the State of Florida to justify jurisdiction under the U.S. Constitution and under the Florida Constitution.

7. Affidavits supporting this Motion to Dismiss will be filed with the Court as soon as Mr. Etheridge has executed them in Mississippi and returned them to the undersigned attorney.

8. This Defendant reserves its right to attack the Complaint on substantive grounds at a later date if this Court determines jurisdiction over its person.

FOWLER, WHITE, GILLEN,
BOGGS, VILLAREAL &
BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411
ATTORNEYS FOR DEFENDANT

By: _____
CHRIS W. ALTENBERND,
ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 8 day of June, 1988 to Patrick O. Helm, Esquire, Post Office Box 921, Gainesville, Florida 32602.

_____

ATTORNEY

APPENDIX F

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY, FLORIDA. CIVIL ACTION.

CHARLES S. ANDREWS and SHELBY ANDREWS, his wife,

Plaintiffs,

vs.

ELWIN ETHERIDGE,

Defendant.

CASE NO. 88-1463-CA-A

FLORIDA BAR NO. 197394

AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF HINDS

BEFORE ME the undersigned authority this day personally appeared JAMES ELWIN ETHERIDGE, and being first duly sworn deposes and says:

1. That he is over the age of 18 and otherwise competent to testify and has personal knowledge of the following facts.

2. That his residence address is Route 1, Box 105J, George Road, Terry, Mississippi 39170.

3. That he is a resident and citizen of the State of Mississippi and has been such a resident and citizen at all times for a time period beginning before April 1, 1986 and continuing through the date of this Affidavit.

4. That, on April 30, 1986, he was not inside the State of Florida and specifically was not at the site of the accident alleged in the Complaint filed by Charles (Steve) Andrews.

5. That on the date of the alleged accident, he was in Jackson, Mississippi.

6. That he is a corporate officer and employee of Etheridge Petroleum and Electric, Inc. That corporation is a Mississippi corporation with its principle business office at 138 Old Highway – 49 South, Jackson, Mississippi 39208.

7. He owns no real property located in the State of Florida.

8. He was not, in his individual capacity, engaged in solicitation or service activities within the State of Florida at the time of the alleged accident or at any time up through the date of this affidavit.

9. He is not, as an individual, involved with products, materials, or things processed, serviced, or manufactured by himself which were used or consumed inside the State of Florida at the time of the accident or at any time up through the date of this affidavit.

10. That his corporation, Etheridge Petroleum and Electric, Inc. did send a crew of three men into the State of Florida in April, 1986 to perform work which the Corporation was obligated to perform under agreements with Charter Marketing.

11. That the crew which was sent to Florida included the Plaintiff as supervisor or foreman and two other individuals.

12. That he does not have a business office or a bank account in the State of Florida.

13. That although his name is James Elwin Etheridge, the summons in this action naming "Elwin Etheridge" was served upon him and he would appear to be the person that the Plaintiff intended to sue in the allegations in the Complaint.

FURTHER AFFIANT SAYETH NOT.

/s/ James Elwin Etheridge
JAMES ELWIN ETHERDIGE

Sworn to and subscribed
before me this 6 day
of May, 1988.

/s/ Nancy G. Luckey
NOTARY PUBLIC – State of Mississippi
My Commission Expires:
My Commission Expires April 28, 1991

APPENDIX G

IN THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA.

CASE NO. 88-1463-CA-A

CHARLES S. ANDREWS and SHELBY ANDREWS, his wife,

Plaintiffs,

vs.

ELWIN ETHERIDGE,

Defendant.

_____/

AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF RANKIN

BEFORE ME the undersigned authority this day personally appeared CHARLES S. ANDREWS, and being first duly sworn deposes and says:

1. That he is over the age of 18 and otherwise competent to testify and has personal knowledge of the following facts.

2. That his residence address is 103 Hunter Road, Florence, Mississippi 39073, and that he is and has been a resident of the State of Mississippi since before April 30, 1986.

3. That prior to and on April 30, 1986, he was an employee of Etheridge Petroleum and Electric Inc. in the capacity of supervisor or foreman.

4. That on April 30, 1986, he was the supervisor or foremen of a crew consisting of himself and two other employees that were sent by Etheridge Petroleum to the State of Florida to perform work for the corporation under a contract with Charter Marketing.

5. That prior to leaving with his crew for the State of Florida, he personally discussed the faulty electrical equipment to be used at the job in Florida, with James E. Etheridge. Specifically, he discussed with Mr. Etheridge the fact that the electrical equipment had been shorting out and the wiring was done improperly. Mr. Etheridge was aware of this problem but informed him that he was to use it at the job site in Florida and that it would be repaired when they returned from the job.

6. The electrical equipment mentioned in paragraph 5 above belonged to Etheridge Petroleum and Electric Inc. and the reason the defects were not corrected was due to the direct actions of James E. Etheridge by refusing to allow maintenance to be performed on the equipment until it returned from Florida.

7. That he had numerous conversations prior to April 30, 1986 with James E. Etheridge about the fact that the air compressor provided for the use of his crew was too small and underpowered to operate cleaning and safety equipment necessary for the job. Said air compressor was owned and maintained by Etheridge Petroleum and Electronic Inc.

8. That at all times he dealt directly with James E. Etheridge as his personal supervisor and as the one personally responsible for the lack of maintenance on and the use of improper equipment used on the job site,

which the Affiant believes and has alleged in his complaint were the direct and proximate cause of the accident and his injuries.

FURTHER AFFIANT SAYETH NOT.

/s/ Charles S. Andrews
CHARLES S. ANDREWS

Sworn to and subscribed
before me this 15th day
on August, 1988.

/s/ illegible
NOTARY PUBLIC – State of Mississippi
My Commission expires:
My Commission Expires July 11, 1992

APPENDIX H

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR
MARION COUNTY, FLORIDA. CIVIL ACTION

CHARLES S. ANDREWS and
SHELBY ANDREWS, his wife,

Plaintiffs,

vs.

CASE NO. 88-1463-CA-A

ELWIN ETHERIDGE,

FLORIDA BAR NO. 197394

Defendant.

ORDER GRANTING MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON

THIS CAUSE came on for consideration upon the Motion to Dismiss for Lack of Jurisdiction Over the Person of Elwin Etheridge. This Court having considered the Motion, the Affidavit in Support of the Motion, and the relevant case law, it is

ORDERED AND ADJUDGED that the Plaintiffs' Complaint be and hereby is dismissed without prejudice for lack of jurisdiction over the person of the Defendant, Elwin Etheridge.

ORDERED this 13 day of Sept., 1988 in Ocala, Marion County, Florida.

/s/ Wallace E. Sturgis, Jr.
HONORABLE WALLACE E. STURGIS, JR.
Circuit Court Judge

Copies furnished to:

Patrick O. Helm, Esquire
Chris W. Altenbernd, Esquire

APPENDIX I

IN THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA.

CHARLES S. ANDREWS and SHELBY ANDREWS, his wife,

Plaintiffs,

CASE NO.

vs.

ELWIN ETHERIDGE,

Defendant.

AMENDED COMPLAINT

COMES NOW, the Plaintiffs, CHARLES S. ANDREWS AND SHELBY ANDREWS, by and through their undersigned attorney and sues ELWIN ETHERIDGE and states:

COUNT I

1. This is an action for damages in excess of $5,000.00.

2. At all times material hereto, the Plaintiff, CHARLES S. ANDREWS, was over 21 years of age.

3. At all times material hereto, the Defendant, ELWIN ETHERIDGE, was the owner, corporate officer and employee of Etheridge Petroleum and Electric, Inc. d/b/a Armor Shield of Mississippi. Etheridge Petroleum and Electric, Inc. is incorporated in the State of Mississippi and ELWIN ETHERIDGE is a resident of the State of Mississippi.

4. ELWIN ETHERIDGE is subject to jurisdiction of the courts of the State of Florida pursuant to Chapter 48.193 *Florida Statutes* as a result of committing the following acts:

A. Operating, conducting, engaging in or carrying on a business venture in the State of Florida.

B. Causing injury to persons or property within the State of Florida arising out of an act or omission by the Defendant outside the State of Florida.

5. ELWIN ETHERIDGE is further subject to the jurisdiction of the Courts of the State of Florida pursuant to Chapter 440.11 (1) *Florida Statutes* and *Streeter v. Sullivan*, 509 So 2d 268 (Fla 1987). The approximate language in the statute places liability on a fellow employee of the Plaintiff where such fellow employee "acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death . . . ". The decision in *Streeter v. Sullivan* holds that owners and corporate officers are employees for the purposes of this statute.

6. Etheridge Petroleum and Electric, Inc. is engaged in the business of installing, repairing and cleaning gasoline station pumping equipment and underground fuel storage tanks.

7. On or about April 30, 1986, the Plaintiff CHARLES S. ANDREWS, was an employee of Etheridge Petroleum and Electric, Inc. as the foreman for a crew to repair and clean underground fuel storage tanks. While sandblasting the interior of an underground fuel storage

tank located at the Charter Oil Gasoline Station in Silver Springs, Marion County, Florida, an explosion occurred inside the tank, resulting in serious and catastrophic injuries to the Plaintiff, CHARLES S. ANDREWS.

8. At the time of the accident, the Plaintiff was using air compressors, sandblasters and electrical equipment owned and maintained by Etheridge Petroleum and Electric, Inc.

9. As owner, corporate officer and employee of Etheridge Petroleum and Electric, Inc., ELWIN ETHERIDGE was directly responsible for the equipment used the [sic] Plaintiff and his crew. In his capacity as owner, corporate officer and employee, ELWIN ETHERIDGE was personally knowledgeable as to the type of equipment necessary for the proper and safe conduct of the Plaintiff's job of cleaning out underground fuel tanks. He was also personally knowledgeable of the maintenance status of the equipment used the [sic] Plaintiff at the time of the accident.

10. The Plaintiff, CHARLES S. ANDREWS, was injured in the accident of April 30, 1986, as a direct result of the negligence of ELWIN ETHERIDGE in that:

A. The Defendant, ELWIN ETHERIDGE, failed to provide the Plaintiff, CHARLES S. ANDREWS, with an air compressor of sufficient size and power to operate all of the equipment necessary for the successful completion of the job and operate the proper air mover to insure adequate ventilation and the removal of flammable vapors from the fuel tank. Because the power from the compressor was insufficient, the Plaintiff was forced to

use an inadequate ventilation system which was below fire code standards for this type of work.

B. The Defendant, ELWIN ETHERIDGE, failed to provide the Plaintiff, CHARLES S. ANDREWS, with adequate and properly wired lighting equipment to use inside the fuel tank while it was being cleaned. Specifically, the lamp attached to the sandblasting hose used to clean the tank was improperly wired and maintained.

C. As a result of the inadequate ventilation and removal of flammable vapors as well as the improperly wired and maintained lamp and electrical wiring, an explosion occurred in the fuel tank being cleaned by the Plaintiff, resulting in serious and catastrophic injuries to the Plaintiff.

11. The Defendant, ELWIN ETHERIDGE, knew of the defects outlined in paragraph 9 above and was fully aware that the equipment provided was substandard and improperly maintained for their proper and safe use by the Plaintiff as intended. Despite this knowledgeable, and, further, despite the fact that the Defendant has been asked by the Plaintiff CHARLES S. ANDREWS, as well as other employees, to correct these deficiencies, the Defendant continued to provide the Plaintiff with the substandard equipment.

12. Just prior to the accident on April 30, 1986, employees of Etheridge Petroleum and Electric, Inc. were attempting to make repairs on the electrical system as a result of frequent and reoccurring short circuiting in the system. Despite his personal knowledge of the short circuiting problem, the Defendant, ELWIN ETHERIDGE, ordered his employees to stop the repair work and not to

complete it until after the equipment returned from the job in Florida where the accident occurred.

13. As a result of the failures outlined in paragraphs 10, 11 and 12, the Defendant, ELWIN ETHERIDGE, failed to provide the Plaintiff, CHARLES S. ANDREWS, with a reasonably safe and secure place to undertake his work for the Defendant.

14. As a result of his failures outlined above, the Defendant, ELWIN ETHERIDGE, acted with gross negligence and was guilty of willful and wanton misconduct resulting in a foreseeable injury to the Plaintiff, CHARLES S. ANDREWS.

15. As a direct and proximate result of the Defendant's gross negligence and willful and wanton misconduct, the Plaintiff, CHARLES S. ANDREWS, was injured in and about his body and extremities, suffered permanent disability, permanent disfigurement, mental anguish, pain and suffering, loss of capacity for the enjoyment of a normal life, aggravated a pre-existing condition, or activated a latent condition, lost wages, suffered an impairment of his earning capacity, and incurred medical and hospital expenses in the treatment of said injuries. Said injuries are permanent and continuing in nature.

WHEREFORE, the Plaintiff, CHARLES S. ANDREWS, demands damages for compensation in an amount in excess of $5,000.00, from the Defendant, ELWIN ETHERIDGE, exclusive of costs of this action and post-judgment interest, and further demands trial by jury on all issues.

COUNT II

16. The Plaintiff, SHELBY ANDREWS, realleges paragraphs 1 through 13 and further alleges:

17. That as a further direct and proximate result of the aforesaid gross negligence and willful and wanton misconduct by the Defendant, ELWIN ETHERIDGE, and as a result of the injuries sustained by her husband, CHARLES S. ANDREWS, SHELBY ANDREWS will be deprived of her husband's consortium, services, care and the comfort of his society.

WHEREFORE, the Plaintiff, SHELBY ANDREWS, demands damages for compensation, in an amount in excess of $5,000.00, from the Defendant, ELWIN ETHERIDGE, exclusive of costs of this action and post-judgment interest and further demands a trial by jury on all issues.

/s/ Patrick O. Helm
PATRICK O. HELM, ESQUIRE
Brooks and Helm, P.A.
P.O. Box 2921
Gainesville, FL 32602
(904) 376-3028
Attorneys for Plaintiffs

APPENDIX J

IN THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, STATE OF FLORIDA
CIVIL DIVISION

CHARLES S. ANDREWS and
SHELBY ANDREWS, his wife,

Plaintiffs,

Case No.: 88-1463-CA-A

vs.

ELWIN ETHERIDGE,

Defendant.

SPECIAL APPEARANCE AND MOTION TO STRIKE "AMENDED COMPLAINT"

The Defendant, ELWIN ETHERIDGE, by and through his undersigned attorneys, appears specially herein and moves this Court for the entry of an order striking the Plaintiffs' Amended Complaint on grounds that this Court has previously ruled that it lacks jurisdiction over the person of ELWIN ETHERIDGE and there no longer is a proceeding in Florida in which Mr. Andrews and his wife can pursue this matter. In support of this Motion, the Defendant will show to this Court that:

1. The Plaintiffs filed an action herein against Mr. Etheridge in April, 1988. Mr. Etheridge appeared specially and moved to dismiss this Complaint for lack of jurisdiction over his person. Affidavits were filed in support of that Motion.

2. On September 13, 1988, this Court entered an order dismissing the action for lack of jurisdiction over the person. Since a dismissal for lack of jurisdiction over

the person cannot rule upon issues other than jurisdiction, the order was a dismissal without prejudice to bring the action in another court possessing jurisdiction.

3. The Plaintiffs did not appeal the Order of Dismissal.

4. The Order of Dismissal did not grant leave to amend and was a final order on the only issue before this Court, i.e. the issue of jurisdiction. Although the Order which determines this Court has no jurisdiction over Mr. Etheridge is now clearly the law of the case or res judicata between the Plaintiffs and Mr. Etheridge, they appear to have filed an Amended Complaint without leave of this Court in a forum which has already established that it lacks jurisdiction over Mr. Etheridge.

5. Accordingly, the Plaintiffs' Amended Complaint should be stricken because it has been filed without a pending proceeding in a court without jurisdiction.

RESPECTFULLY SUBMITTED,

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
P. O. BOX 1438
TAMPA, FLORIDA 33601
813/228-7411

BY Chris W. Altenbernd
CHRIS W. ALTENBERND, ESQ.

MEMORANDUM OF LAW IN SUPPORT OF MOTION

Even a Court which has no jurisdiction over the person of a Defendant does have the power and jurisdiction to determine the issue of jurisdiction. *Allbright v. Hanft*, 333 So.2d 112 (Fla. 2d DCA 1976). When parties

appear specially within a proceeding to challenge jurisdiction, the jurisdictional decision becomes binding upon the parties. *Allbright v. Hanft*, 333 So.2d 112 (Fla. 2d DCA 1976).

In this case, the Plaintiffs did not appeal the Order dismissing the action for lack of jurisdiction over the person of the Defendant. Instead, the Plaintiffs have simply filed an unauthorized "Amended Complaint" in a Court which no longer has jurisdiction over anything.

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P. A.
P. O. BOX 1438
TAMPA, FLORIDA 33601
813/228-7411

By Chris W. Altenbernd
CHRIS W. ALTENBERND, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 24 day of October, 1988, to PATRICK O. HELM, ESQ., P.O. BOX 921, GAINESVILLE, FL. 32602.

/s/ Chris W. Altenbernd
ATTORNEY

No. 89-913

In The

Supreme Court of the United States

October Term, 1989

ELWIN ETHERIDGE,

Petitioner,

v.

CHARLES S. ANDREWS and
SHELBY S. ANDREWS, his wife,

Respondents.

**On Petition For Writ Of Certiorari To
The Florida Fifth District Court Of Appeal**

RESPONDENTS' BRIEF IN OPPOSITION

RUSSELL W. LA PEER
Counsel of Record

and

GARY L. SANDERS
PATTILLO & MCKEEVER, P.A.
Post Office Box 1450
Ocala, Florida 32678
(904) 732-2255
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether personal, long-arm jurisdiction may be exercised over a nonresident co-employee, (a) who is an officer, agent, and employee of a corporate employer; and (b) who is alleged to have created, in the forum state, by willful and wanton or grossly negligent acts or omissions outside of the forum state, dangerous employment conditions that caused, in the forum state, injury to another employee, notwithstanding that the conduct was carried out whilst in the scope and authority of employment with the corporation.

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TABLE OF AUTHORITIES – Continued

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CONSTITUTIONAL PROVISION AND FLORIDA STATUTES INVOLVED

U.S. Const. amend. XIV:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Fla. Stat. § 48.193 (1987): Acts subjecting person to jurisdiction of courts of state (Appendix A, p. 1a to this brief).

Fla. Stat. § 440.11(1) (1987): Exclusiveness of liability (Appendix B, p. 4a to this brief).

STATEMENT OF CASE

In accordance with Rules 24.2 and 14.1(g) of the Rules of the Supreme Court of the United States, Respondent adopts the statement of the case set forth in the Petition, with the following key facts – contained in the amended complaint and in the affidavit of Respondent Charles F. Andrews – which are missing from Petitioner's statement of the case.

Petitioner personally knew the type of equipment necessary for the proper and safe completion of Respondent Andrews' job in Florida. Petitioner personally knew the maintenance status of the equipment to be used by Respondent Andrews at the time of the accident.

Before leaving with his crew for the job in Florida, Respondent Andrews personally informed Petitioner, that the electrical equipment to be used had been shorting out and that the wiring was improper. Other employees

attempted to make repairs to the electrical system, but Petitioner personally ordered them to stop and not to complete repairs until after the equipment had been returned from the job in Florida

Likewise, Respondent had previously requested Petitioner to repair an air compressor to be used at the job site in Florida in order to ensure an adequate ventilation system; but Petitioner failed to correct the deficiency. As a result of the inadequate ventilation in the fuel tank and the improperly wired electrical equipment, an explosion occurred in a fuel tank being cleaned by Respondent Andrews and resulted in his severe injuries.

Respondent Andrews sued Petitioner in Florida alleging that, in his individual capacity as a co-employee, he had committed willful and wanton or grossly negligent acts or omissions, out-of-state, that produced a dangerous condition of employment within Florida causing injury to Respondent Andrews.

Liability is predicated under **Fla. Stat.** § 440.11(1) as articulated by the Florida Supreme Court in *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987). **Fla. Stat.** § 440.11(1) allows for liability of employees for their gross negligence resulting in death or injury to their fellow employees. The Florida Supreme Court in *Streeter* ruled that an officer, executive, supervisor or other corporate employee is a co-employee for purposes of the statute.

SUMMARY OF ARGUMENT

Petitioner has been sued in Florida, under **Fla. Stat.** § 440.11(1), on charges of conduct (a) of a willful and

wanton or grossly negligent character; (b) resulting in injury to a fellow employee in Florida; and (c) for which he can only be liable if committed by him personally, as a co-employee, in the scope of his employment with the corporate employer. The fact that the conduct occurred outside of Florida does not alter the basis for liability or for long-arm jurisdiction over him. No issue of imputing to him the purely corporate activities of the corporate employer even arises.

The exercise of long-arm jurisdiction over Petitioner, under **Fla. Stat.** § 48.193, is consistent with the standards of the Due Process Clause, because Petitioner reasonably had to have anticipated that conduct such as that with which he is charged would affect working conditions and fellow employees at the job location in Florida; and that the interests of Florida in preventing, and redressing, injuries resulting from unsafe working conditions in Florida, would afford a forum in which Petitioner would be required to defend, and answer, individually for such conduct by him.

ARGUMENT

I. THE FLORIDA APPELLATE COURT'S RULING PROPERLY UPHOLDS LONG-ARM JURISDICTION OVER PETITIONER, PURSUANT TO *FLA. STAT.* § 48.193, BASED ON ALLEGATIONS AND AVERMENTS OF HIS INDIVIDUAL CONDUCT AS A CO-EMPLOYEE.

Petitioner, Elwin Etheridge, is properly subject to the jurisdiction of the Florida courts, under the Florida long-arm statute. He is alleged, as a co-employee, to have

caused by willful and wanton or grossly negligent acts or omissions outside of Florida, unsafe working conditions in Florida and resultant injury to Respondent, Charles Andrews, in Florida.

Not only is this "not a complex case" which "does not involve big names, hundreds of plaintiffs or defendants, or vast sums of money" (Petition at 6); it does not present an issue concerning imputation of corporate minimum contacts to individual officers and employees, for purposes of long-arm jurisdiction and due process considerations.[1]

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[1] The question, whether the conduct of individuals, who are officers, agents, or employees of corporations, and who act within the scope of their employment or agency with the corporation, may subject them to personal, long-arm jurisdiction, has been analyzed by courts and commentators as "the fiduciary shield doctrine." *See, e.g., Davis v. Metro Productions, Inc.*, 885 F.2d 515, 520-22 (9th Cir. 1989) (under fiduciary shield doctrine, person's mere association with corporation that causes injury in forum state not sufficient in itself to permit forum to assert jurisdiction over person; but individual may be subject to personal jurisdiction in forum state as well, where corporation is agent or alter ego of individual, or where conduct and an interest of corporation and individual are identical); *Stuart v. Spademan*, 772 F.2d 1185, 1196-98 (5th Cir. 1985) (fiduciary shield doctrine – that individual's acts within state solely as corporate agent do not create personal jurisdiction over him – does not apply, when individual is alter ego of corporation, or when acts of individual officers or agents are identical with corporation's acts and provide personal liability for harm to third persons); *Holfield v. Power Chemical Co., Inc.*, 382 F.Supp. 388, 394 (D. Md. 1974) (individual defendant subject to long-arm jurisdiction because corporation, acting by him, was his alter ego); *Lawson v. Baltimore Paint & Chemical*

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This is not an extraordinary case of constitutional magnitude, justifying certiorari review by this Court. Petitioner is not a simple, passive officer of a corporation who finds himself haled into the Florida courts based solely on conduct of the corporation alone.

In accordance with the public policy of the State of Florida, as enacted by the Florida Legislature in **Fla. Stat.** § 440.11, and as articulated by the Supreme Court of Florida in *Streeter v. Sullivan*, 509 So.2d at 270-72, Petitioner Etheridge has been sued in the Florida courts, on allegations that, by willful and wanton or grossly negligent acts or omissions outside of the State of Florida, as a co-employee, he created a dangerous employment condition within the State of Florida which caused injury in Florida to a co-employee. To be held responsible for those injuries is not to impute liability to him, based solely on conduct of the corporation.

Responsibility is attributed to him individually, as a co-employee, for such conduct, despite the fact that it occurred as well within the scope and authority of his employment and agency with the corporate employer, Etheridge Petroleum & Electric, Inc.

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Corp., 298 F.Supp. 373, 379-80 (D. Md. 1969) (allegations of amended complaint went beyond mere fact that individual defendants acted as directors and officers of corporation: active conduct on behalf of corporation, for individual as well as corporate benefit, causing tortious injury in Maryland, subjected them to long-arm jurisdiction by Maryland courts). *See generally*, Sponsler, *Jurisdiction Over the Corporate Agent: the Fiduciary Shield*, 35 Wash. & Lee L. Rev. 349 (1978).

For purposes of personal jurisdiction, this is not an attempt to impute to Petitioner neutral conduct on behalf of the corporation, which could have been carried out only as the acts of the corporation.[2] Neither is it an attempt to impute to him the minimum contacts and purposeful activities of the corporation alone.

Instead, he may be required to respond in the Florida courts to charges that willful and wanton or grossly negligent acts or omissions that he took, outside of the State of Florida, as a co-employee, produced a dangerous condition in Florida, resulting in injuries in Florida to a fellow employee, notwithstanding that such acts or omissions were also the acts of the corporate employer. The allegations of the amended complaint and the averments of the affidavits establish, prima facie[3], that Petitioner has

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[2] To be sure, if Petitioner had been sued solely on account of acts "that could have been committed only by the corporation," *Excel Handbag Co. v. Edison Bros. Stores, Inc.*, 428 So.2d 348, 350 (Fla. 3d D.C.A. 1983), those acts could not be attributed to Petitioner for purposes of the necessary minimal contacts on which to predicate personal jurisdiction over him. *Stuart v. Spademan*, 772 F.2d at 1197 & n.11. "[J]urisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13, 104 S.Ct. 1473, 1482 n.13, 79 L.Ed.2d 790 (1984).

[3] A plaintiff, who bears the burden of establishing personal jurisdiction over defendant, *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278, 57 S.Ct. 197, 201, 81 L.Ed. 183 (1936); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 384 (5th Cir. 1989); *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1270 (5th Cir. 1983); *Data Disc, Inc. v. Systems Technology Assocs, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977), meets that burden by presenting a prima facie case for personal jurisdiction. *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d at 384; *DeMelo v. Toche Marine,*

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been so sued in the Florida courts. These facts satisfy several conditions of the Florida long-arm statute,

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Inc., 711 F.2d at 1270; *Data Disc, Inc. v. Systems Technology Assocs, Inc.*, 557 F.2d at 1285.

Where (as in the case at hand) the trial court considers only written materials, affidavits, depositions, or other discovery materials – without holding an evidentiary hearing – "it is necessary only for these materials to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss," *Data Disc, Inc. v. Systems Technology Assocs, Inc.*, 557 F.2d at 1285; and "all conflicts in the facts alleged in opposing affidavits 'must be resolved in [the] plaintiff[s'] favor for purposes of determining whether a prima facie case for *in personam* jurisdiction has been established.' " *DeMelo v. Toche Marine, Inc.*, 711 F.2d at 1271, *quoting United States Ry. Equipment Co. v. Port Huron & Detroit R.R. Co.*, 495 F.2d 1127, 1128 (7th Cir. 1974). *Accord Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d at 384; *Data Disc, Inc. v. Systems Technology Assocs, Inc.*, 557 F.2d at 1285; *O'Hare Int'l. Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971) (affidavits filed pursuant to Rule 12(d) motions to dismiss presented contradictory factual allegations from which to decide jurisdictional issues; and conflicting statements required assuming facts related in plaintiff's affidavits and complaint to be true).

This does not foreclose the possibility of a contrary conclusion ultimately, should the factual averments of the plaintiff not be supported, or be refuted, by the evidence on the merits. *See DeMelo v. Touche Marine, Inc.*, 711 F.2d at 1271 n.12 (eventually plaintiff must establish jurisdiction by preponderance of evidence at pretrial evidentiary hearing or at trial); *Data Disc, Inc. v. Systems Technology Assocs, Inc.*, 557 F.2d at 1280 n.2 (plaintiff must still prove jurisdictional facts at trial by preponderance of evidence); *Thompson v. King*, 523 F.Supp. 180, 184 n.1 (M.D. Fla. 1981) (by end of trial plaintiff must prove by preponderance of evidence sufficient facts supporting jurisdiction).

Fla. Stat. § 48.193.[4]

To say that his actions were merely or only those of the corporation ignores that, under Florida law, individuals who are corporate officers, agents, and employees,

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[4] Although pleading the language of the Florida long-arm statute alone is sufficient to satisfy Florida procedural law, Fla. R. Civ. P. 1.070(i), it appears that it is not necessary to plead either specific statutory language or provisions, so long as the factual allegations and averments correspond to conditions of the long-arm statute for asserting *in personam* jurisdiction, sufficiently to inform and give notice to the defendant of the basis for which he is being required to respond in the Florida courts. *Woods v. Jorgensen*, 522 So.2d 935, 936 n.1 (Fla. 1st D.C.A. 1988); *Carlson Design & Associates, Inc. v. Anderson Athletic Club, Inc.*, 485 So.2d 871, 872 (Fla. 1st D.C.A.), *rev. dismissed*, 491 So.2d 278 (Fla. 1986). In the case at hand, the Florida trial and appellate courts appear to have been satisfied that the factual averments correspond to statutory conditions for long-arm jurisdiction, to furnish notice to Petitioner.

In any event, whether, and to what extent, the exact language and provisions of the long-arm statute must be pled, in addition to corresponding factual allegations and averments, are exclusively matters of state law, which do not present an issue for review by this Court, and with which it need not be concerned.

Absent an inconsistency with federal law, state law procedural and evidentiary rules of law do not present a federal question within this Court's power to review. *Herb v. Pitcairn*, 324 U.S. 117, 125-26, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945) (Supreme Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudged federal rights . . . [w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion".); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128-29, 65 S.Ct. 1475, 1480-81, 89 L.Ed. 2092 (1945) (where state court

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and who commit in Florida individual tortious acts[5] within the scope of their employment and agency –

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held that parties by their pleadings had conceded that Federal Communications Commission had no jurisdiction over controversy, Supreme Court could not determine correctness of such holding on certiorari, in that waiver of issue by failure to raise question in pleadings is matter of state law); *Wainwright v. Sykes*, 433 U.S. 72, 86-87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977) (failure to follow Florida's procedural rule by not making timely objection to admission of inculpatory statements, under Florida's contemporaneous objection rule, amounted to independent and adequate state ground, preventing direct review in Supreme Court); *Henry v. Mississippi*, 379 U.S. 443, 446-48, 85 S.Ct. 564, 567, 13 L.Ed.2d 408 (1965) (same, Mississippi rule); *Prince v. Massachusetts*, 321 U.S. 158, 163, 64 S.Ct. 438, 440-41, 88 L.Ed. 645 (1944) (question whether conduct of minor amounted to a "sale," "offer to sell," or "work", prohibited under state statute, was decided at state court level, and not open to review by Supreme Court); *Sage Stores Co. v. Kansas ex rel. Mitchell*, 323 U.S. 32, 35, 65 S.Ct. 9, 10, 89 L.Ed. 25 (1944) (whether or not Kansas statute covered facts at issue was matter solely for determination of Kansas, in suit involving issue of whether statute violated federal due process or equal protection under Fourteenth Amendment).

[5] For purposes of the Florida long-arm statute, **Fla. Stat.** § 48.193, a tort occurs where the injury occurs: "the place of *injury* is the location of the tortious act for purposes of long-arm jurisdiction under Florida's statute." *Lee B. Stern & Co., Ltd. v. Green*, 398 So.2d 918, 919 (Fla. 3d D.C.A. 1981) (emphasis in original). *Accord Bangor Punta Operations, Inc. v. Universal Marine Co.*, 543 F.2d 1107, 1109 (5th Cir. 1976) (Florida long-arm statute reaches "situation where a foreign tortious act caused injury in Florida"); *Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1212-13 (5th Cir. 1975) (Florida long-arm statute to be read broadly to include situation in which foreign tortious act causes injury within Florida); *International Harvester Co. v.*

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regardless of whether they are residents or non-residents[6] – are held to respond and stand accountable in the Florida courts.

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Mann, 460 So.2d 580, 581 (Fla. 1st D.C.A. 1984) (commission of tort for purposes of establishing long-arm jurisdiction does not require physical entry into state, but merely that "place of *injury* be within Florida" (emphasis in original)); *Carida v. Holy Cross Hospital, Inc.*, 424 So.2d 849, 851 (Fla. 4th D.C.A. 1983) (no distinction between physical tort committed in state, and tort committed by sending false statements into state, from out-of-state).

[6] If Petitioner were a resident of Florida, and an officer and employee of a Florida corporation, and committed a tortious act within the scope of his employment with the corporation, he could be sued in the Florida courts, and held to respond accountably, by a third party. *White-Wilson Medical Center v. Dayta Consultants, Inc.*, 486 So.2d 659, 661 (Fla. 1st D.C.A. 1986); *Derf Cattle Co. v. Colpac Int'l., Inc.*, 463 So.2d 430 (Fla. 3d D.C.A. 1985); *Littman v. Commercial Bank & Trust Co.*, 425 So.2d 636, 640 (Fla. 3d D.C.A. 1983); *Naranja Lakes Condominium No. One, Inc. v. Rizzo*, 422 So.2d 1080 (Fla. 3d D.C.A. 1982); *Orlovsky v. Solid Surf, Inc.*, 405 So.2d 1363, 1364 (Fla. 4th D.C.A. 1981); *Adams v. Brickell Townhouse, Inc.*, 388 So.2d 1279, 1280 (Fla. 3d D.C.A. 1980); *Dade Roofing & Insulation Corp. v. Torres*, 369 So.2d 98, 99 (Fla. 3d D.C.A. 1979). *Cf. American Credit Card Telephone Co. v. National Pay Telephone Corp.*, 504 So.2d 486, 488, 490 (Fla. 1st D.C.A. 1987) (complaint was devoid of allegations that corporate officers individually involved in tortious acts or derelictions of duty).

By the same token, if Petitioner lived (were domiciled or resided) in Florida, he would be subject to suit, by a co-employee, in Florida, for liability on account of conduct as a co-employee that affects other employees in Florida (pursuant to **Fla. Stat.** § 440.11), notwithstanding the fact that he is also

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In fact, under Florida law, neither the basis for liability, nor the basis for long-arm personal jurisdiction, rests – or can rest – on imputing to Petitioner mere neutral conduct by the corporate employer. A co-employee is liable under **Fla. Stat.** § 440.11(1) only if he has committed willful and wanton or grossly negligent acts – acts which are necessarily those of the individual co-employee. The only basis for liability against Petitioner under **Fla. Stat.** § 440.11(1), is the assertion that his own willful and wanton or grossly negligent acts, as a co-employee (not the mere acts of the corporate employer) caused injury to Respondent in Florida.

> [T]he plain language of sections 440.01 and 440.11(1) precludes any further explanation of legislative intent. These statutes unambiguously impose liability on all employees for their gross negligence resulting in death or injury to their fellow employees. This imposition of liability is blind to corporate status. Nowhere does section 440.11(1) impose upon injured employees a requirement to show that the fellow employee has committed some affirmative act going beyond the scope of the employer's nondelegable duty to provide a safe place to work. We

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an officer of the corporation through which it acts. *Streeter v. Sullivan*, 509 So.2d at 270-72.

If Petitioner, although residing outside of Florida, and although an officer or agent, as well as an employee of a foreign (non-Florida) corporation, committed an individual tortious act, in Florida, within the scope of his employment, he could still be held to stand accountable, in the Florida courts, by a third party. *Lee B. Stern & Co., Ltd. v. Green*, 398 So.2d at 920; *Odell v. Signer*, 169 So.2d 851, 853-54 (Fla. 3d D.C.A. 1964), *cert. discharged*, 176 So.2d 94 (Fla. 1965). *See Stuart v. Spademan*, 772 F.2d at 1197.

> are not inclined to read such a requirement into the statute when it is plainly not there.
>
> The affirmative act doctrine has its roots in cases interpreting section 440.11(1) before it was amended in 1978. Those cases did not have the benefit of the legislature's statement expressly imposing liability on grossly negligent employees who injure other employees.

Streeter v. Sullivan, 509 So.2d at 271. That same conduct by Petitioner, as a non-resident co-employee, is the basis for long-arm jurisdiction over him under **Fla. Stat.** § 48.193. The same individual acts are the basis for both substantive liability and personal jurisdiction.

II. THE FLORIDA COURTS' EXERCISE OF PERSONAL JURISDICTION OVER PETITIONER ETHERIDGE, BY THE FLORIDA LONG-ARM STATUTE, IS CONSISTENT WITH THE DUE PROCESS CLAUSE.

Given that the out-of-state conduct with which a nonresident defendant is charged satisfies conditions of the State's long-arm statute, the Due Process Clause marks the limit on the exercise of State jurisdiction over a nonresident. *Asahi Metal Indus. Co., Ltd. v. Superior Court of Calif., Solano County*, 480 U.S. 102, 108, 107 S.Ct. 1026, 1031, 94 L.Ed.2d 92 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 565, 62 L.Ed.2d 490 (1980); *Kulko v. Superior Court of Calif.*, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222, 78 S.Ct. 199, 200, 2 L.Ed.2d 223 (1957).

To determine that boundary for exercising long-arm jurisdiction consistent with the Due Process Clause, the prerequisite standard ("constitutional touchstone") is that

the nonresident defendant have some purposeful connection ("minimum contacts" or "affiliating circumstances") with the forum state, to make it reasonable and fair, and "not offend traditional notions of fair play and substantial justice," for him to defend in the courts of that state. *Asahi Metal Indus. Co., Ltd. v. Superior Court of Calif., Solano County*, 480 U.S. at 113, 107 S.Ct. at 1033; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 294, 100 S.Ct. at 565; *Rush v. Savchuk*, 444 U.S. 320, 327, 100 S.Ct. 571, 577, 62 L.Ed.2d 516 (1980); *Kulko v. Superior Court of Calif.*, 436 U.S. at 92, 98 S.Ct. at 1696-97; *Hanson v. Denckla*, 357 U.S. 235, 251, 78 S.Ct. 1228, 1238, 2 L.Ed.2d 1283 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. at 222-23, 78 S.Ct. at 200-01.

To judge minimum contacts, the courts properly focus on the relationship amongst the defendant, the forum, and the litigation. *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 775, 104 S.Ct. at 1478.

For purposes of deciding whether the case at hand warrants certiorari review, this Court might simply determine whether this case is akin to *Rush v. Savchuk*, (plaintiff, injured in automobile accident in Indiana, and covered by insurance policy issued to him in Indiana, moved to Minnesota and sued insurer there); *World-Wide Volkswagen Corp. v. Woodson*, (plaintiffs who bought automobile in New York, drove it to new home in Arizona, had accident in Oklahoma, and sued defendants in Oklahoma courts); *Kulko v. Superior Court of Calif.*, (father, whose divorce decree in New York gave him custody of daughter, sued by mother concerning conditions of

decree in California, where she lived and where daughter moved to be with her); *Hanson v. Denckla*, (testamentary legatees in Florida sued trustee and beneficiaries of trusts, residents in Delaware, in Florida court concerning assets of the trusts); or more like *Keeton v. Hustler Magazine, Inc.*, and *Calder v. Jones, supra.*

Keeton v. Hustler Magazine, Inc., presented a New York resident suing, in the New Hampshire courts, a corporate citizen of Ohio and California (along with individuals who were not citizens or residents of New Hampshire), for libel damages. The only contacts by the defendants with New Hampshire were the monthly sale of copies of the magazine in that state. 465 U.S. at 772, 104 S.Ct. at 1477. This Court rejected the corporate publisher's contention that injury from a single publication was so insufficient a relationship or contact with New Hampshire as to make the exercise of long-arm personal jurisdiction unfair. *Id.* at 773-75, 104 S.Ct. at 1477-78. The Court repeated the tripartite relationship to be examined "[i]n judging minimum contacts": "the relationship among the defendants, the forum, and the litigation." *Id.* at 775, 104 S.Ct. at 1478.

The corporation's contact by "regular circulation of magazines in the forum State [New Hampshire was] sufficient to support an assertion of jurisdiction." *Id.* at 773. New Hampshire's interest in redressing injuries that actually occur within the state, in preventing in-state libel, and providing a forum cooperatively with other states for litigating libel issues and damages, was a substantial one, that justified requiring the defendants to answer in the New Hampshire courts. *Id.* at 776-78, 104 S.Ct. at 1479-80.

The relationship of the litigation, to the defendant's contact with New Hampshire, and to New Hampshire's interests, was "sufficient to support jurisdiction when the cause of action [arose] out of the very activity being conducted, in part, in New Hampshire." *Id.* at 780, 104 S.Ct. at 1481.

Concerning the individual defendants, the Court noted that it did "not of course follow from the fact that jurisdiction may be asserted over Hustler Magazine, Inc., that jurisdiction may also be asserted over either of the other defendants," because "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him." *Id.* at 1781 n.13, 104 S.Ct. at 1482 n.13. At the same time, the Court reiterated its rejection "that employees who act in their official capacity are somehow shielded from suit in their individual capacity." *Id.*

Calder v. Jones (decided along with *Keeton v. Hustler Magazine, Inc.*) presented the additional question of whether the nonresident, individual defendants could be required to defend (along with their nonresident corporate employer) in California against charges of libel damage to the plaintiff in California. "[L]ikening themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California," the individual defendants contended that the effects in California, of their activities in Florida, were so "fortuitous," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 295, 100 S.Ct. at 566, and "adventitious," *Rush v. Savchuk*, 444 U.S. at 329, 100 S.Ct. at 577, as to be without purposeful intent.

This Court rejected the claims of the individual defendants that, because they had made no visits to California[7], and the only act in California was the injurious effect of libel damage to the plaintiff, resulting from actions "performed outside the State," *id.* at 787, 104 S.Ct. at 1485, the individual defendants could not be deemed responsible for the corporate employer's circulation of the libelous article in California. *Id.* at 789, 104 S.Ct. at 1487.

Noting that the individual defendants had been charged, not "with mere untargeted negligence," but with tortious actions "expressly aimed at California," the Court held that it was reasonable and fair to expect them to anticipate being called upon to answer for their actions in the California courts. *Id.* at 789-90, 104 S.Ct. at 1487. While it was "correct that their contacts with California [were] not to be judged according to their [corporate] employer's activities there," at the same time, they were not immune from suit or liability because their conduct had been carried out as employees of the corporate employer. *Id.* at 790, 104 S.Ct. at 1487.

> On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually.

Id.

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[7] The Court gave no consideration to the disputed factual questions concerning trips, investigative activities, and telephone calls to California by one of the individual defendants. *Id.* at 785 n.4, 787 n.6, 104 S.Ct. at 1485 nn.4, 6.

The question presented by the instant Petition is whether, on the facts alleged and averred, it is reasonable to expect that Petitioner knew, or should have known, that he would be held to appear in the Florida courts and answer for injuries to fellow employees in Florida, caused by his out-of-state conduct.

A. RELATIONSHIP OF PETITIONER TO FLORIDA: NATURE AND QUALITY OF CONTACTS.

Personal jurisdiction is not "avoided merely because the defendant did not *physically* enter the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. at 476, 105 S.Ct. at 2184 (emphasis in original). It is "an inescapable fact of modern commercial life" that business and employment activities are purposefully carried on in other states without the physical presence of individual actors responsible for the conduct. *Id.*

Additionally, the character of the conduct, the quality and nature of the activity, within the forum state may be deemed to have been sufficiently purposeful by the nonresident actor, so as to invoke the benefit and protection of the State, and its personal jurisdiction over him. *International Shoe Co. v. Washington*, 326 U.S. 310, 318, 66 S.Ct. 154, 159, 90 L.Ed. 95 (1945). *See Kulko v. Superior Court of Calif.*, 436 U.S. at 92, 98, 98 S.Ct. at 1697, 1700; *Hanson v. Denckla*, 357 U.S. at 253, 78 S.Ct. at 1240.

A single purposeful act by a nonresident, within the forum State, has been upheld as constitutionally adequate for the exercise of long-arm personal jurisdiction. *See McGee v. International Life Ins. Co.*, 355 U.S. at 221, 223, 78 S.Ct. at 200-01 (single breach of insurance contract in

California by a nonresident insurer sufficient for long-arm jurisdiction). *Cf. Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1, 3, 15 L.Ed.2d 39, 43 (1965) (Goldberg, J. in chambers) (commission of tort in New York, by out-of-state conduct, sufficient for *in personam* jurisdiction under New York long-arm statute).[8]

In the case at hand, Petitioner Etheridge is "not charged with mere untargeted negligence." *Calder v. Jones*, 465 U.S. at 789, 104 S.Ct. at 1487. He is asserted to have made deliberate decisions affecting conditions of employment and safety of equipment to be used by a fellow employee, whom he knew was being sent into Florida to do the work, with that equipment and in those conditions.[9]

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[8] The Florida courts have similarly held that applying the Florida long-arm statute for personal jurisdiction over a non-resident defendant, based on "a single isolated transaction[,] . . . does not necessarily offend due process." *Lacy v. Force V Corp.*, 403 So.2d 1050, 1054, 1056 (Fla. 1st D.C.A. 1981) (single breach of contract to be performed in Florida). *Accord Godfrey v. Neumann*, 373 So.2d 920, 922 (Fla. 1979) ("single isolated . . . tortious act"); *A.J. Sackett & Sons Co. v. Frey*, 462 So.2d 98, 99 (Fla. 2d D.C.A. 1985) ("nonresident manufacturer's single sale of a product in Florida"); *Pennington Grain & Seed, Inc. v. Murrow Bros. Seed Co., Inc.*, 400 So.2d 157, 158-59 (Fla. 1st D.C.A. 1981) (single delivery of soybean seed to Florida).

[9] Petitioner's statements (Petition at 16, 17, 18) concerning the absence ("nonexistent nature") of contact with Florida can only be sustained on the belief – already rejected by this Court, *Calder v. Jones*, 465 U.S. at 790, 104 S.Ct. at 1487 – that he is immune from suit and liability because his acts were also the acts of the corporate employer within the scope of whose employment he acted.

This is not a casual, fortuitous, or random occurrence. The circumstances of Respondent's employment, and of the condition of the materials and equipment to be used by him, were known and intended by Petitioner to take place in Florida.

It is incredible that Petitioner should compare himself (Petition at 18) to a corporate decision-maker for a company like Asahi Metal, in *Asahi Metal Indus. Co. v. Superior Court of Calif., Solano County, supra.* Since, in that case, the corporation, Asahi Metal, had no activities or contact with California, *a fortiori* its president, "in his role as corporate decision-maker," could have had no such contacts.

In contrast, Petitioner concedes that "[t]here is little doubt that the corporat[e employer] would be subject to the jurisdiction of the Florida courts" in the case at hand (Petition at 17). Since the allegations and averments of the Amended Complaint and affidavits ascribe flagrant individual conduct to Petitioner, as a co-employee, within the course of his employment, the only – and altogether different – question here is whether he is immune from suit and liability in his individual capacity, because the conduct was also carried out on behalf of the corporation.

Florida has already ruled that he is not immune from liability, *Streeter v. Sullivan, supra;* and this Court has "reject[ed] the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity." *Keeton v. Hustler Magazine, Inc.,* 465 U.S. at 781 n.13, 104 S.Ct. at 1482 n.13. Individuals' "status as employees does not somehow insulate them from

[long-arm, personal] jurisdiction." *Calder v. Jones*, 465 U.S. at 790, 104 S.Ct. at 1487.

B. RELATIONSHIP OF FLORIDA'S INTEREST TO PETITIONER'S CONDUCT AND TO THE LITIGATION.

Florida's interest in preventing the creation or allowance of dangerous conditions of employment in the State, resulting in injuries to employees in Florida, is a legitimate justification for holding accountable co-employees – regardless of their residence – whose willful and wanton or grossly negligent acts or omissions create the unsafe working conditions. This interest is neither unreasonable, nor an unfair surprise. Any co-employee – whether a resident or not – who offends that interest should reasonably anticipate being haled into court in Florida.

Additionally, Florida has a "significant interest in redressing injuries that actually occur within the State," which it properly "may also extend . . . to a nonresident." *Keeton v. Hustler Magazine, Inc.*, 456 U.S. at 776-77, 104 S.Ct. at 1479. *See Ford Motor Co. v. Atwood Vacuum Machine Co.*, 392 So.2d 1305, 1313 (Fla. 1981) (Florida, as place of injury, has interest in litigation to assert jurisdiction over nonresident manufacturer).

C. RELATIONSHIP OF PETITIONER TO LITIGATION.

The fact that Mississippi may not, but Florida law and the Florida courts do, offer Respondent a remedy for

injuries that he sustained from unsafe employment conditions, alleged to have been caused by flagrant conduct on the part of Petitioner, is no different than the libel-plaintiff's "successful search for a State with a lengthy statute of limitations," in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 779, 104 S.Ct. at 1480; and it is precisely the situation to which this Court referred in upholding "the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules." *Id.*

In short, from the relationship amongst Petitioner, Florida, and this litigation, there is nothing unfair, unreasonable, or unanticipated about Petitioner being required to answer, in Florida, for deliberate, egregious conduct that he knew would affect the materials and conditions of employment to be used by Respondent in Florida, and from which Respondent's injuries in Florida are alleged to have resulted.

CONCLUSION

The allegations and averments in the case at hand establish, prima facie, that Petitioner, a resident of Mississippi, personally committed, out-of-state, while in the course of his employment as a co-employee of the corporate employer, flagrant conduct that he knew would affect the safety of working conditions in Florida, and which caused injury to a fellow employee in Florida. Under Florida law, **Fla. Stat.** § 440.11(1), he could only be liable based on charges that such conduct was committed by him individually.

To answer such charges, Petitioner is fairly and reasonably subject to *in personam* jurisdiction in the Florida courts, under the Florida long-arm statute, **Fla. Stat.** § 48.193, and consistent with the Due Process Clause. No imputation to Petitioner of purely corporate conduct is at stake; and his Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Florida Statutes § 48.193 (1987):

Acts subjecting person to jurisdiction of courts of state.

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a tortious act within this state.

(c) Owning, using, or possessing any real property within this state.

(d) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

(3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.

(4) If a defendant in his pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.

(5) Nothing contained in this section limits or affects the right to serve any process in any

other manner now or hereinafter provided by law.

APPENDIX B

Florida Statutes § 440.11(1) (1987):

Exclusiveness of liability.

(1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or the legal representative thereof in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow servant, that the employee assumed the risk of the employment, or that the injury was due to the comparative negligence of the employee. The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter. Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the

employer's business but they are assigned primarily to unrelated works within private or public employment.

No. 89-913

In The

Supreme Court of the United States

October Term, 1989

ELWIN ETHERIDGE,

Petitioner,

v.

CHARLES S. ANDREWS AND
SHELBY S. ANDREWS, HIS WIFE,

Respondents.

On Petition For Writ Of Certiorari To The
Florida Fifth District Court Of Appeal

PETITIONER'S REPLY MEMORANDUM

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The response of the Andrews to the Petition before this Court demonstrates why the courts below erroneously ruled that Florida could constitutionally require Elwin Etheridge to defend a lawsuit in this State. Rather than answer the jurisdictional question posed, the Respondents have simply chosen to ignore it. Instead of resolving that issue, the Andrews have devoted a considerable portion of their brief to a discussion premised upon Florida's recognition of a gross negligence exception to its workers' compensation act and how the alleged conduct of Mr. Etheridge would fall within the parameters of Florida's Long-Arm Statute. With all due respect, the Respondents' argument simply misses the point which is raised in this petition.

The Respondents maintain that Florida courts have recognized a cause of action for gross negligence against a worker's co-employee. They further emphasize that Florida's Long-Arm Statute allows certain out-of-state defendants to be sued in Florida for certain specified conduct. This argument, however, does not address the constitutional factor to the exercise of jurisdiction over Mr. Etheridge in the overall jurisdictional equation. Whether their argument is based upon their legitimate confusion or, alternatively, a tacit concession of the correctness of Mr. Etheridge's argument, the fact remains that the Andrews have not demonstrated how Florida may constitutionally require Mr. Etheridge to defend the suit in Florida.

The Andrews have elected to emphasize the legal theory upon which they are attempting to recover and have overlooked the absence of any contacts between the

State of Florida and Elwin Etheridge. They have overlooked the fact that it was the corporate contacts with Florida that they relied upon in order to even argue an assertion of personal jurisdiction over Elwin Etheridge. The contacts with Florida were those of the corporation, not Mr. Etheridge's. Indeed, unlike the defendants in several of the cases that the Respondents have cited to the Court, Mr. Etheridge has never made so much as a phone call to the State of Florida. The mere fact that the allegations in their complaint may fall within the exception created by the Florida Supreme Court in *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987), simply does not automatically confer jurisdiction in the Florida Courts over the person of Elwin Etheridge.

Illustration of this argument through the use of a hypothetical situation may be instructive. For example, the vice-president of a Florida corporation, who has absolutely no contacts with the State of Georgia, directs his secretary to go to Georgia to buy office supplies. The secretary follows this directive and while in Georgia runs over a pedestrian. Georgia has recently passed a law that imposes vicarious liability on fellow employees for the acts of their co-employees. Under the rationale advanced by the Respondents, it would not offend notions of due process to require the vice-president to defend any suit brought against him in a Georgia court. This would be true even though he had no "minimum contacts" with the State of Georgia. Such a result would be contrary to the well-settled principles that have been established over the years by this Court. The hypothetical Georgia statute may very well allow some plaintiff to state a cause of action against the Florida vice-president. That does not

mean, however, the statute can be used to constitutionally confer jurisdiction upon the Georgia courts over the non-resident corporate officer. Similarly, Florida may recognize a cause of action for gross negligence against a co-employee but that does not mean that this cause of action can be relied upon to constitutionally obtain jurisdiction over Elwin Etheridge.

The Respondents contend that for purposes of deciding whether this case warrants certiorari review, this Court should determine whether the facts of this case are similar to those in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984). The respondents claim that like the defendants in *Keeton* and *Calder*, jurisdiction may be exercised over the person of non-resident Elwin Etheridge. The Andrews' reliance on *Keeton* and *Calder* is both misleading and misplaced. In *Keeton*, it was not seriously debated that the defendants "general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state." 465 U.S. at 774. This course of conduct was found to satisfy the "minimum contacts" needed between the defendant and the forum state. *Id.* The real issue in *Keeton* was whether the plaintiff's lack of contacts with the forum state could defeat jurisdiction that was otherwise proper under New Hampshire law and the due process clause. This Court held that a plaintiff's lack of contacts with a forum state will not automatically defeat jurisdiction *if the defendant has sufficient contacts with the forum state*. 465 U.S. 779-80.

The Respondents contend that this Court has rejected the argument that employees will be shielded from suit

when their acts are conducted within their official capacity. (Response at 15) This statement is misleading. Petitioner would point out that while this Court did state that employees who act in their official capacity will not necessarily be shielded from suit in their individual capacity, this Court also stated:

> But jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary. . . . *Each defendant's contacts with the forum State must be assessed individually.* . . . ('the requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction').

465 U.S. at 781-82 n. 13. (Citations omitted) (Emphasis supplied)

The Respondents' reliance on *Calder v. Jones* is also misplaced. In *Calder*, attention was again focused on the plaintiff's contacts with the forum state. This Court stated that "the plaintiff's lack of 'contacts' will not defeat otherwise proper jurisdiction, . . . but they may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises." 465 U.S. at 788. The record revealed that the alleged libelous story concerned the California activities of a California resident, that the article was drawn from California sources, and that the harm would be suffered in California. Based on all these factors, this Court concluded that "California is the focal point both of the story and of the harm suffered. Jurisdiction over Petitioners is therefore

proper in California based on the 'effects' of their Florida conduct in California." 465 U.S. at 789.

The Respondents contend that the question to be answered in this case is whether it is reasonable to expect that Elwin Etheridge knew, or should have known, that he would be called upon to answer in the Florida courts for injuries to fellow employees in Florida, caused by his out-of-state conduct. Given his lack of contacts with the State of Florida, the answer to that question must be no. The exercise of personal jurisdiction over Elwin Etheridge by the courts of Florida exceeds the limits of due process.

Respectfully submitted,

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